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LEGISLATIVE EDUCATION STUDY COMMITTEE

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December 12, 2007

MEMORANDUM

TO: Legislative Education Study Committee

FR: Peter van Moorsel *PvM*

**RE: WRITTEN REPORT: STUDY SCHOOL FUNDING FOR EMPLOYEE
LEGAL COSTS, HM 77a**

In 2007, the Legislature passed House Memorial (HM) 77a, which requested that staff from the Public Education Department (PED), the Legislative Education Study Committee (LESC), in consultation with staff from the Legislative Finance Committee (LFC) and the Legislative Council Service (LCS) identify and analyze the legitimacy of the expenditure of state funds by school districts for the purpose of defending the districts and their school boards and employees in legal actions alleging misconduct. The memorial requested that the study include research on the following issues:

- the existing criteria in New Mexico public school districts for evaluating the merits of legal actions against districts and their employees and whether to expend funds in defense of those legal actions;
- the amount of attorney fees and legal expenses expended by each of the state's school districts annually for the last six years in addressing legal questions for the district and its school board and employees, including any cases of particularly outstanding controversy or expense;
- whether school districts impose limits on the expenditure of funds for attorney fees and litigation expenses;
- any elements that may keep the legal expenses of certain school districts consistently low; and
- the practices of school districts and state governments in surrounding states and comparable jurisdictions with regard to the expenditure of state funds by school

districts to defend the districts and their school boards and employees against legal actions.

In response to the memorial, PED submitted the attached report. The report includes an Attorney General Opinion on whether it is appropriate to use funding to defend public school districts, boards, and employees in legal actions involving misconduct. The opinion states that “as a legal matter, providing a defense for school districts, officials and employees in lawsuits alleging misconduct is a legitimate use of public funds, *subject to certain limitations*.” The opinion concluded that under five criteria and in the absence of a controlling statute, public money could be used to defend public employees against allegations of wrongdoing. “Nevertheless,” the opinion states, “the Legislature has the ultimate authority to determine the appropriate use of school district funds, including a prohibition against using public money to provide a defense for school officials and employees in lawsuits not covered by the *Tort Claims Act* or allowing payment of legal expenses only in connection with civil or other specified cases.” The five criteria require that:

- the charges must arise from the discharge of an official duty in which the government has an interest;
- the public employee must have been acting in good faith when the alleged wrongful conduct occurred;
- the employing government entity must have express or implied legal authority to pay the employee’s legal expenses;
- the employee must be exonerated of the charges; and
- the decision to pay the fees must be made by an impartial official or official body.

The report indicates that under these five criteria, it appears that public funds may only be used on a reimbursement basis, as the fourth criterion states that the employee must first be exonerated of the charges.

The report also presents findings of a survey issued by PED to all 89 school districts. PED reports that 26 of the 89 school districts responded to the survey. Based on the responses to the survey, PED has tabulated the total district expenditures on legal matters during the last six years, and has included a list of the reasons given by districts for making legal expenditures (see pages 7-8 of the report).

PED concludes in the report that school district funds can be used to defend district employees in educator misconduct legislation, and adds that under the *Tort Claims Act*, districts must defend employees charged with such infractions who allegedly did so while acting in the scope of their employment. Except for Albuquerque Public Schools, which is self-insured, districts can file a claim with the New Mexico Public School Insurance Authority (NMPSIA) to pay for an employee’s legal defense. NMPSIA would then have the authority to settle such a claim short of trial if the claim had merit. Because of its specific coverage of districts, NMPSIA would not, however, provide legal defense for a licensed district employee charged with a crime related to their school employment such as physical abuse of a child. In theory, under the five criteria set forth in the referenced 2007 Attorney General Opinion, a district could reimburse an employee for his/her legal expenses after the employee was exonerated of the charges. Each of the remaining criteria must also be satisfied before payment is made. The above analysis and results do

not appear to apply in the situation where a licensed district employee is faced with administrative charges of educator misconduct. NMPSIA is not required to defend since an administrative charge is neither a tort claim nor tort litigation for which compensation might have to be paid.

Based on the results of the study, PED does not support any new legislation during the 30-day legislative session; however, the department suggests that future legislation might include mandating all of the five criteria suggested by the Attorney General, and imposing clear consequences should a district make such expenditures in violation of statute. PED states that mandatory reimbursement by the district or the employee of the amounts expended might be one way to ensure compliance. Also, legislation might consider prohibiting districts/charter schools from reimbursing or paying legal expenses to defend educators from adverse licensure actions by PED.



**New Mexico
Public Education Department**

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NOV 28 2007

LESC

**House Memorial 77a of 2007
Report by
Public Education Department**

LESC
December 2007

Dr. Veronica C. García
Secretary of Education

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DR. VERONICA C. GARCÍA
SECRETARY OF EDUCATION

BILL RICHARDSON
Governor

November 28, 2007

MEMORANDUM

TO: Legislative Education Study Committee,
Legislative Finance Committee, and
Legislative Counsel Service

THRU: Veronica C. García, Ed.D. *VCG/ED*
Secretary of Education
Public Education Department

FROM: Willie R. Brown *WRB*
General Counsel
Public Education Department

RE: **HOUSE MEMORIAL 77 STUDY ON SCHOOL DISTRICTS' USE OF STATE FUNDS TO DEFEND AGAINST EDUCATOR MISCONDUCT LITIGATION**

BACKGROUND:

On or about March 6, 2007 during the 2007 Regular Session, House Memorial 77 was introduced by Representative Sheryl M. William Stapleton, a member of the Legislative Education Study Committee ("LESC"). The House Memorial passed by a vote of 62 – 0. (see **Attachment 1**)

A precipitating factor that led to this memorial involved a much-publicized experiment on racism that was conducted in April 2005 in the high school in Truth or Consequences Municipal Schools ("T or C"). To conduct the experiment, student-initiated but faculty-approved "whites-only" and "people of color" signs were placed above water fountains and restroom doors in the high school. They were torn down the same day by non-participating students. The Public Education Department ("PED") received a complaint about the incident and conducted an investigation that resulted in adverse licensure actions being filed against two administrators and one teacher. A complaint was also filed with the Office for

Civil Rights' Denver office.¹ Forty-nine members of the T or C high school faculty and staff signed a petition supporting the three educators; over 100 students also signed a petition supporting those educators. The incident generated a flurry of emails, letters and media coverage that only magnified the volatility of the experiment on racism that was, according to its defenders, supposed to be *against* racism.

The three educators were represented by the same attorney at a licensure hearing that commenced in late February 2007 in Truth or Consequences. The hearing was heavily attended by community members. The media was also in attendance. During the second day of the hearing, the PED and the three educators came to a resolution. The educators agreed that the student-initiated project that had been approved by the educators created at least the appearance of discrimination on the basis of race or color and should not have been approved. All administrators were to participate in some racial sensitivity training; also, the three educators agreed to accept a formal letter of reprimand which would be placed in their licensure files at the PED for a period of 18 months. The settlement with PED was signed on February 28, 2007. As indicated previously, House Memorial 77 was introduced six (6) days later.

REASONS STATED IN HOUSE MEMORIAL 77 FOR A STUDY:

House Memorial 77 listed five (5) reasons for conducting the slated study. Those reasons include:

1. recent controversies in the state's public school districts had elevated attention to allegations of misconduct in school districts;²
2. some of the controversies had led to litigation in which school districts used school funds to finance litigation expenses in defending lawsuits against school boards and district employees;
3. the use of public school funds in defending litigation expenses might not be reviewed or approved by the PED;
4. school boards enjoy substantial autonomy in handling their own affairs, including controversies regarding alleged misconduct by teachers, administrators and other employees; and
5. that in order for the Legislature to exercise its oversight, it should gather information on the expenditure of state funds by school districts for the purposes of paying legal fees and costs in defending alleged misconduct by teachers, administrators and other employees.

¹The Office for Civil Rights or "OCR" is part of the United States Department of Education. The Denver office is one of 12 regional offices in the country that investigate complaints of discrimination on the basis of race, color or national origin in any educational institution that receives federal funds. The OCR is also the lead federal office in education that investigates Title IX complaints. Title IX is most frequently invoked in addressing allegations of gender discrimination in educational programs and competitive athletics in colleges and secondary schools.

² The 2007 Regular Session also resulted in the passage of Senate Bill 210, which required school districts to report to the PED within 30 days of licensed staff who were leaving or had left their employment with their district after having been accused of educator misconduct.

SCOPE OF STUDY STATED IN HOUSE MEMORIAL 77:

The scope of the study in House Memorial 77 resolved that the PED and LESC, in consultation with the Legislative Finance Committee and Legislative Council Service (“LCS”), identify and analyze the legitimacy of the expenditure of state funds by school districts for the purpose of defending their school boards and employees in legal actions alleging misconduct. The ensuing study was to include research on five (5) issues of concern:

1. the current criteria in school districts for evaluating the merits of legal actions against districts and their employees and whether to expend funds to defend in those legal actions;
2. the amount of legal fees and expenses expended annually during the past six (6) years by each school district, including any cases of particular outstanding controversy or expense;
3. whether districts impose limits on the expenditure of funds for legal fees and litigation expenses;
4. any factors that might keep legal expenses of school districts consistently low; and
5. the practices of school districts and state governments in surrounding states regarding the expenditure of state funds by school districts to defend their districts, school boards and employees against legal action.

The resulting report on the research and findings by the PED, LESC, LFC and LCS was to be submitted to the LESC. The memorial did not call for recommendations for legislation nor does the PED support any new legislation during the impending short session of the Legislature on any findings identified in the report.

METHODOLOGY USED TO GATHER THE DATA FOR THE STUDY:

Because only school districts possess the information called for by the memorial, the PED issued a survey to all 89 school districts. (see **Attachment 2**) The survey asked statistical information in a non-embarrassing and non-identifying manner so that no district would view itself as being singled out. Prior to issuance, a draft of the survey was routed to the LESC, LFC and LCS for input. After input was received from the LESC, the survey was issued.

APPLICABLE LAWS AND RULES:

July 2007 Attorney General Opinion

Pursuant to state law that permits elected officials to request an opinion from the New Mexico Attorney General, Representative Stapleton asked the Attorney General for an opinion on whether, “[It

is] appropriate to use public funding to defend public school districts, boards and employees in legal actions involving misconduct?"

Attorney General Opinion No. 07-03 ("Opinion"), answering the question with a qualified affirmative response stated, "As a legal matter, providing a defense for school districts, officials and employees in lawsuits alleging misconduct is a legitimate use of public funds, *subject to certain limitations*." (see **Attachment 3**) The Opinion did not, however, address an adverse licensure action in which a licensed district employee could lose or have their educator license restricted by the PED after a hearing following the procedures under the Uniform Licensing Act³. The Opinion acknowledged that Representative Stapleton's question stemmed from House Memorial 77 and stated that New Mexico law already required school districts to "provide a legal defense for their officials and employees in some cases." Indeed, the authority for this assertion comes from the Tort Claims Act [41-1-1 to 41-1-27, NMSA 1978], which applies in torts⁴ and civil rights claims against school districts, school board members and school employees. Unless legal defense is covered by an insurance carrier, the Tort Claims Act *requires* a governmental entity (including a school district) to provide a defense at no cost to the public employee for any tort or constitutional violation alleged to have been committed by the employee while acting within the scope of their duty. The Opinion, relying on a 1985 New Mexico Attorney General advisory letter addressing a similar issue⁵, concluded that under five criteria and in the absence of a controlling statute, public money could be used to defend public employees against allegations of wrongdoing. The five criteria require that:

1. the charges must arise from the discharge of an official duty in which the government has an interest;
2. the public employee must have been acting in good faith when the alleged wrongful conduct occurred;
3. the employing government entity must have express or implied legal authority to pay the employee's legal expenses;
4. the employee must be exonerated of the charges; and
5. the decision to pay the fees must be made by an impartial official or official body.

The Opinion states further that it would be a prohibition of the anti-donation clause of Article IX, Section 14 of the New Mexico Constitution to pay an employee's *personal* legal expenses. The example given involved a 1988 attempt by the LFC to pay attorney's fees for two Legislators who

³After enactment of the 2003 educational reforms with the passage of House Bill 212, the PED came under the Uniform Licensing Act [22-10A-31, NMSA 1978] whenever it undertook any action to deny, suspend or revoke a license.

⁴A tort is a civil action other than breach of contract for which damages are recoverable. The classic tort involves the claim of negligence, although torts can also involve willful acts, libel/slander, and strict liability.

⁵Specifically, Attorney General Advisory Letter No. 85-23 addressed whether the General Services Department could provide criminal defense insurance coverage for public employees. The answer was in the affirmative.

personally filed a lawsuit challenging the governor's line item vetoes. The Opinion also stated that public funds cannot be used to provide a defense in *personal proceedings*. The examples given include a lawsuit by a school board member to determine his right to hold and exercise his office ("quo warranto") and an election challenge.

According to the Opinion, all five criteria must be met in order to legitimately use public funds to provide defense for school districts, officials and employees in legal proceedings alleging misconduct. Criterion four might be the most problematic of the criterion a district would have to satisfy. In order to comply with the fourth criterion, it appears that legal expenses could only be paid on a *reimbursement* basis. Indeed, two attorney general opinions cited on Page 4 of the Opinion approve of *reimbursements* of legal expenses. Put differently, for a school district to pay the legal expenses of a school employee/official who was exonerated of charges, the employee/official could only receive reimbursement *after* he/she was exonerated.

New Mexico Public Schools Insurance Authority

Generally speaking, the Public Schools Insurance Authority Act ("Act") [22-29-2 to 22-29-12, NMSA 1978], requires the New Mexico Public Schools Insurance Authority ("NMPSIA") to obtain liability, workers compensation and group health insurance for all school districts unless they petition for and are granted a waiver of this coverage. School districts must, of course, pay for the coverage. NMPSIA maintains general liability coverage in a master policy in which it is the named insured. School districts are included in this coverage by an errors and omissions endorsement to the master policy. Risk-related coverage includes coverage for personal property, crime, general liability, civil rights, personal injury liability, motor vehicle and fleet vehicle property damage and liability, school bus physical damage and liability, workers compensation and other risks. See, Section 6.50.7.10 New Mexico Administrative Code. [Rule 6.50.7 NMAC "*Employee-Benefit and Risk-Related Minimum Benefit and Financial Standards Participation Waiver*"]

Even if NMPSIA seeks to disclaim coverage, if a school district files a claim with NMPSIA under the Act, NMPSIA would have to provide a defense. Presumably, the risks that NMPSIA provides coverage for are civil lawsuits against a school district. It is not likely that NMPSIA must provide legal defense against administrative actions such as an adverse licensure action by the PED against a licensed district employee for misconduct.

Public Education Department's Rule

In 2005, a New Mexico school district became embroiled in a much-publicized citizen recall dispute involving 4 of its 5 board members. The recall efforts were ultimately successful but the targeted board members asserted their opposition all the way up to the New Mexico Supreme Court where they lost. Public school funds were used in their defense amid much public criticism. In an effort to prevent such use of funds in the future, the PED amended its school district budgeting rule [6.20.2 NMAC] in November 2006. The relevant language in Section 6.20.2.23 NMAC of the amended rule reads:

B. Legal fees: No district funds shall be used for payment of personal legal fees, including attorney's fees and costs, of any school district or charter school employee or local school board member. Any payment of legal fees must serve a clearly identifiable public interest. Personal legal fees include, but are not limited to:

- (1) legal fees expended in obtaining or retaining any elected position;
- (2) legal fees incurred by any employee or board member in any civil action filed by or against the employee or board member in his or her personal capacity, unless, in the case of an action against the employee or board member, the allegations are based upon acts taken by that individual in the course and scope of his or her employment or service; and
- (3) legal fees incurred by any employee or board member in the defense of any criminal case, unless the charges are based upon acts taken in the course and scope of his or her employment or service.

While the rule pre-dated the July 2007 Attorney General Opinion, it is fairly accurate in its reach except for the absence of the five criteria. The rule did not, because of the absence of specific statutory authority, contain any adverse consequences should a district expend district funds contrary to the rule.

District Budget Approval Process

It has been said that the 1974 Public School Finance Act was intended to equalize financial opportunity at the highest possible revenue level and to guarantee each New Mexico public school student equal access to programs and services appropriate to their needs regardless of geographic location or local economic conditions. In its most simple form, the statewide funding formula uses cost differentials to reflect the costs associated with providing educational services to students with differing needs such as based upon their grade, or whether they require bilingual education or special education services. Each district has a "program cost," which is an amount of money assumed necessary under the statewide funding formula for that district to operate with a particular configuration of students and educational programs to provide educational services. Public schools must submit an operating budget to the PED annually by April 15th; the PED must approve and certify a district's budget by July 1 of each year. The budgeting process is complex and must take into consideration the various program units and other variables including the unit value for the school year. These factors are used to compute each district's program cost.

Although school districts must live within their approved budgets, the Public School Finance Act permits the transfer of funds through the budget adjustment request ("BAR") process. In the line item for Legal Expenses in their budget proposals, school districts report aggregate numbers and do not necessarily itemize their budgeting for legal expenses. This is because school districts cannot know in advance what their legal exposure will be for the next school year.⁶ In addition, all allocations from the funding formula are non-categorical as specified in statute giving schools autonomy in determining where resources should be focused. To address one of the concerns of this Memorial, the PED does not review or pre-approve specific legal expenditures by districts. Clearly this would impact districts' local autonomy if the state were required to superimpose its oversight authority in the area of a school district's legal affairs. Moreover, such a practice would be unwieldy and counterproductive given the 89 school districts and 60 charter schools in the state. Also, the PED does not have the staff to become involved in the daily and sometimes crisis-driven legal affairs of school districts and charter schools.

⁶Under Section 22-5-4(E), NMSA 1978, local school boards constitute the legal entity of a school district and have the capacity to sue or be sued.

FINDINGS:

Of the 89 school districts that were surveyed, only 26 districts responded. Of those 26 districts, 8 returned their forms indicating they had incurred no such expenditures. Charter schools were not surveyed because they were not within the scope of the memorial. What follows is a spreadsheet on what the responding districts reported in their surveys.

DISTRICT EXPENDITURES ON LEGAL MATTERS OVER A SPAN OF SIX YEARS

	Amount	Amount	Amount	Annual Totals
06 – 07 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$115,245.89	\$7,002.94	\$74,619.58	\$196,868.41
05 – 06 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$17,138.71	(nothing reported)	\$3,173.68	\$20,312.39
04 – 05 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$51,213.50	(nothing reported)	\$16,399.14	\$67,612.64
03 – 04 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$55,550.59	\$131,268.99	(nothing reported)	\$186,819.58
02 – 03 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$477,410.80	\$10,904.64	(nothing reported)	\$488,315.44
01 – 02 YR	Licensed Employees	Unlicensed Employees	Board Members	Total This Year
	\$64,077.41	\$7,675.17	(nothing reported)	\$71,752.58

AMOUNTS PAID BY NEW MEXICO PUBLIC SCHOOLS INSURANCE AUTHORITY

06 – 07 YR	\$7,002.94
05 – 06 YR	(nothing reported)
04 – 05 YR	(nothing reported)
03 – 04 YR	(nothing reported)
02 – 03 YR	(nothing reported)
01 – 02 YR	(nothing reported)

REASONS LISTED BY DISTRICTS FOR MAKING LEGAL EXPENDITURES

Student removed from bus	Nepotism
Open Meetings Act violation	Election issues
Wrongful termination	Teacher assault of student
EEOC claims	Fair Labor Standards Act
Special Education IEP violation	Computer misuse
Licensure issue/military orders/litigation	Grade changing
Superintendent on administrative leave	Reduction in Force
Violation of civil rights	Audit response
Wrongful termination	Leave abuse issues
Racial discrimination	Student discipline
Termination of bus driver	Personnel matters
Sexual misconduct (touching, sex with student)	Sexual Harassment

THREE YES OR NO PED QUESTIONS POSED TOGETHER WITH DISTRICT RESPONSES

- Do you impose limits on the amount of such expenditures?*
 - 17 districts provided "NO" responses;
 - 1 district indicated it had no written policy for such expenditures and explained that funds for such expenditures are approved by their local board at the June budget hearing.
- Have you instituted preventative measures to avoid or reduce the root causes that result in such expenditures?*
 - 6 districts provided "NO" responses;
 - 10 districts provided "YES" responses;
 - 1 district did not respond to this question.

12 districts provided brief narrative responses describing their preventative measures which included:

 - All staff must attend annual training on employee misconduct;
 - Reporting on improper conduct by employees;
 - Attendance by staff at conferences on sexual harassment and ethics;
 - Emphasis on training new employees;
 - Annual training by NMPSIA;
 - Local board members must attend annual school law conference;
 - Emphasis on compliance with ethical standards of behavior;
 - Employees must sign off on code of ethics and sexual harassment training each year.
- Do you have criteria for determining whether to expend district funds for legal defense against allegations of misconduct?*
 - 12 districts provided "NO" responses
 - 3 districts provided "YES" responses, though one of these also indicated a "NO" response;
 - 4 districts did not respond to this question, though 3 provided narrative comments.

The comments to explain circumstances under which districts made legal expenditures included:

 - They follow NMPSIA guidelines;
 - No such expenditures unless the district is named in a lawsuit;

- They follow guidance from their attorney and try to get advice early;
- Funds that are budgeted for legal expenses are pre-determined during spring budget workshop;
- Determination made on a case-by-case basis by superintendent and school board.

OTHER STATES' PRACTICES:

Only a handful of other states provided information requested by the PED on how they handled the payment of legal fees of school staff faced with educator misconduct litigation. The PED obtained a copy of a 2003 Texas School Performance Review entitled *Navigating the Legal Maze: A Practical Guide for Controlling the Cost of School District Legal Services*. The performance review, conducted by the Texas Comptroller of Public Accounts, found that in 2000-2001 Texas school districts had spent more than \$45 million from their maintenance and operation budgets on legal services. The 20-page report listed and discussed 10 preventative measures districts were encouraged to take to reduce their legal fees. The report can be reviewed online at: <http://www.window.state.tx.us/tspr/legal/>.

The preventative measures in the report consisted of recommendations to:

1. Write and enforce effective polices.
2. Shop around for the appropriate legal counsel.
3. Negotiate (lawyer's) contract provisions and always sign a contract.
4. Hedge against excessive legal costs through insurance policies.
5. Negotiate a retainer for routine and ongoing legal matters.
6. Hire in-house counsel to handle routine legal matters—if feasible.
7. Manage legal costs internally.
8. Monitor monthly legal bills.
9. Establish a tracking and document retention system.
10. Resolve the problems before they turn litigious.

State	Source of Information	What it says
Texas	Texas AG Opinion	State funds cannot be used to pay legal fees of elected official until outcome of prosecution shows official to be innocent.
Kansas	Kansas AG Opinion	Reimbursement of legal fees permitted on a case by case basis so long as money is used for a "public purpose".
Utah	Statute: 53A-6-503	Reimbursement of legal fees permitted by educator who is sued in civil court. Must prevail first. Cannot recover if action is by state licensing entity or educator's own school district.
Indiana	Statute: IC 20-26-5-4(15, (17)	Educators have sovereign immunity for acts or omissions within the scope of their employment. Insurers may still defend but can reserve their rights not to pay judgments or settlements.
North Carolina	Statute: G.S. 115C-42/43	(similar laws as Indiana's)
Nebraska	Statute: 79-516	Permits absolute reimbursement

	(this state has a very liberal law that favors reimbursement under almost any circumstance)	(called indemnification) for <i>all</i> civil, criminal, administrative claims against educators and board members even if they lose their case, provided their underlying behavior was in good faith and reasonably believed to be in the best interests of the school district.
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CONCLUSION:

The partial answer to the question of whether school district funds can be used to defend district employees in educator misconduct litigation is “yes”. In fact, under the Tort Claims Act, districts *must* defend employees charged with such infractions who allegedly did so while acting in the scope of their employment. Unless they are self-insured like Albuquerque Public Schools, districts can file a claim with the New Mexico Public Schools Insurance Authority to pay for an employee’s legal defense. NMPSIA would then have authority to settle such claim short of trial if the claim had merit. Because of its specific coverage of districts, NMPSIA would not, however, provide legal defense for a licensed district employee charged with a crime related to their school employment such as physical abuse of a child. In theory, under the five (5) criteria set forth in the referenced 2007 Attorney General opinion, a district could *reimburse* an employee for his/her legal expenses after the employee was exonerated of the charges. Each of the remaining criteria must also be satisfied before payment were made.

The above analysis and results do not appear to apply in the situation where a licensed district employee is faced with *administrative charges* of educator misconduct. NMPSIA is not required to defend since an administrative charge is neither a tort claim nor tort litigation for which compensation might have to be paid. Thus, the very situation that arose in T or C and gave rise to the instant memorial is not resolved by the referenced Attorney General opinion because not queried. Under the Utah legislative model, school districts may not use public funds to defend educators from adverse actions by that state’s licensing authority.

From a cost benefit or empirical standpoint, the results of the PED’s study do not appear to support legislation. But that is not an end to the issue. While the relative dollars spent annually to defend licensed employees and board members is relatively small and there is no consistent pattern of annual increase during the years surveyed, the real problem is that only 30% of all 89 school districts responded to the survey. Moreover, the largest district in the state did not participate in the study.

The PED does not support any new legislation in this area during the upcoming 30-day session; however, future legislation might include mandating all of the five criteria suggested by the Attorney General and imposing clear consequences should a district make such expenditures contrary to law. Mandatory reimbursement by the district or the employee of the amounts expended might be one way of ensuring compliance. Also, legislation might consider prohibiting districts/charter schools from reimbursing or paying legal expenses to defend educators from adverse licensure actions by the PED.

VCG:wb

Enclosures: Three (3)

ATTACHMENT 1

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DR. VERONICA C. GARCÍA
SECRETARY OF EDUCATION

BILL RICHARDSON
Governor

September 28, 2007

MEMORANDUM

TO: Local School District Superintendents,
School Business Officials

FROM: Dr. Veronica C. García [s/ signature on file]
Secretary of Education

RE: SURVEY OF DISTRICT LEGAL FEE EXPENDITURES FOR SIX YEARS

Greetings Superintendents and School Business Officials:

Attached you will find a three-page survey and a copy of House Memorial 77.

The 2007 Regular Legislative Session saw the adoption of House Memorial 77, introduced by Representative Sheryl Williams Stapleton and passed by a vote of 62 to 0. HM 77 seeks to explore the criteria used to expend district funds on legal fees to defend board members and district staff in legal actions alleging misconduct. The memorial directs the PED together with the Legislative Education Study Committee, the Legislative Finance Committee, and the Legislative Council Service to obtain then study data for the past six years. Obviously, the Legislature is concerned about the amounts being expended for this purpose and whether legislation is needed in that area.

The Public Education Department must report its findings from the study as well as its recommendations for any changes in law to the Legislative Education Study Committee. Therefore, please email your response to maryh.deets@state.nm.us no later than Friday, October 28th. In entering your responses, do not identify by name specific individuals whose legal defense was paid for out of district funds. Also, in order to thoroughly complete your responses, feel free to use additional sheets if needed or simply re-duplicate the survey form. Lastly, if you have not expended any such funds in the past six years, please indicate that in your response and return it to the PED.

Thank you for your cooperation and for the hard work that you do everyday!

VCG:wb

NEW MEXICO PUBLIC EDUCATION DEPARTMENT DISTRICT SURVEY

HOUSE MEMORIAL 77- DIRECTED STUDY OF 6 YEARS' DATA OF LEGAL FEE EXPENDITURES FOR MISCONDUCT

(Note: Please do not give the names of any superintendents in the response boxes in this survey. Also, you may enter "unavailable" or "no expenditure" in the box for any year information is not available or for any year expenditures for legal fees for misconduct were not made.)

<i>ENTER:</i> <u>NAME OF YOUR DISTRICT</u>	<i>DESCRIBE:</i> THE NATURE OF EACH INSTANCE OF MISCONDUCT (e.g., misappropriation, computer misuses, grade changing, sexual harassment of students, sexual harassment of staff etc.)	<i>ENTER:</i> AMOUNT IN DEFENSE OF LICENSED EMPLOYEES	<i>ENTER:</i> AMOUNT IN DEFENSE OF UNLICENSED EMPLOYEES	<i>ENTER:</i> AMOUNT IN DEFENSE OF BOARD MEMBERS	<i>ENTER:</i> TOTAL AMOUNT PAID DURING SCHOOL YR
2006 -2007 SCHOOL YEAR					
NMPSIA CONTRIBUTION IF ANY					
2005 -2006 SCHOOL YEAR					
NMPSIA CONTRIBUTION IF ANY					
2004 -2005 SCHOOL YEAR					
NMPSIA CONTRIBUTION IF ANY					

A MEMORIAL

REQUESTING THAT STAFF FROM THE PUBLIC EDUCATION DEPARTMENT AND THE LEGISLATIVE EDUCATION STUDY COMMITTEE, IN CONSULTATION WITH STAFF FROM THE LEGISLATIVE FINANCE COMMITTEE AND LEGISLATIVE COUNCIL SERVICE, IDENTIFY AND ANALYZE THE LEGITIMACY OF THE EXPENDITURE OF STATE FUNDS BY SCHOOL DISTRICTS FOR THE PURPOSE OF DEFENDING THE DISTRICTS AND THEIR SCHOOL BOARDS AND EMPLOYEES IN LEGAL ACTIONS ALLEGING MISCONDUCT.

WHEREAS, certain recent controversies in New Mexico public school districts have brought public attention to alleged misconduct in New Mexico school districts; and

WHEREAS, those controversies have lead to litigation in which school districts use state funds channeled through the public school funding formula to finance litigation expenses for lawsuits brought against school districts and their school boards and employees; and

WHEREAS, decision-making at the school district level regarding expenditure of state funds for legal expenses may not be reviewed or approved by the public education department; and

WHEREAS, by constitution and practice, school boards in New Mexico have a great deal of autonomy in handling their own affairs, including controversies that may arise regarding

alleged misconduct by teachers, administrators and other employees; and

WHEREAS, in order to exercise properly its oversight powers, the legislature should gather information on the expenditure of state funds by school districts for the purposes of paying attorney fees and other legal expenses in defense of alleged misconduct by teachers, administrators and other employees;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO that staff from the public education department and the legislative education study committee, in consultation with staff from the legislative finance committee and the legislative council service, be requested to identify and analyze the legitimacy of the expenditure of state funds by school districts for the purpose of defending the districts and their school boards and employees in legal actions alleging misconduct; and

BE IT FURTHER RESOLVED that the study include research on the following issues:

A. the existing criteria in New Mexico public school districts for evaluating the merits of legal actions against districts and their employees and whether to expend funds in defense of those legal actions;

B. the amount of attorney fees and legal expenses expended by each of the state's school districts annually for

the last six years in addressing legal questions for the district and its school board and employees, including any cases of particularly outstanding controversy or expense;

C. whether school districts impose limits on the expenditure of funds for attorney fees and litigation expenses;

D. any elements that may keep the legal expenses of certain school districts consistently low; and

E. the practices of school districts and state governments in surrounding states and comparable jurisdictions with regard to the expenditure of state funds by school districts to defend the districts and their school boards and employees against legal action; and

BE IT FURTHER RESOLVED that the staffs of the public education department, the legislative education study committee, the legislative finance committee and the legislative council service present a report on their research and findings to the legislative education study committee and the legislative finance committee no later than November 1, 2007; and

BE IT FURTHER RESOLVED that copies of this memorial be transmitted to the secretary of public education and the directors of the legislative education study committee, the legislative finance committee and the legislative council service.



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

July 18, 2007

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 07-03

BY: Elizabeth A. Glenn
Assistant Attorney General

TO: The Honorable Sheryl William Stapleton
New Mexico State Representative
Box 25385
Albuquerque, NM 87108

QUESTION:

Is it appropriate to use public funding to defend public school districts, boards and employees in legal actions involving misconduct?

CONCLUSION:

As a legal matter, providing a defense for school districts, officials and employees in lawsuits alleging misconduct is a legitimate use of public funds, subject to certain limitations.

FACTS:

The question addressed in this opinion stems from House Memorial 77, adopted during the 2007 regular legislative session. House Memorial 77 directs staff from the Public Education Department and the Legislative Education Study Committee, in consultation with staff from the Legislative Finance Committee and the Legislative Council Service, to conduct a study of: the criteria local school districts now use to evaluate the merit of legal actions filed against them; amounts districts spend on legal actions; what limits districts impose on spending for litigation costs and attorneys fees; and practices of

school districts and state governments in surrounding states regarding the use of state money to defend school districts, boards and employees in legal actions. This opinion focuses on the legality of using public money to provide a defense for public school districts and their officers and employees.

ANALYSIS:

New Mexico law now requires school districts to provide a legal defense for their officials and employees in some cases. The Tort Claims Act, NMSA 1978, §§ 41-1-1 to-27 (1976, as amended through 2003), applies to tort and civil rights claims against public school districts, school board members and school employees. Governmental entities, including public school districts, and their elected and appointed officials and employees generally are immune from liability for any tort, except as waived under the Tort Claims Act, while acting within the scope of duty. NMSA 1978, §§ 41-4-3(B), (C), (F); 41-4-4. Unless provided by an insurance carrier, the Act requires a governmental entity to provide a defense, including costs and attorneys fees, for any of its employees against whom a claim is brought for:

- (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
- (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

NMSA 1978, § 41-4-4(B). "Scope of duty" is defined, for purposes of the Tort Claims Act, as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." NMSA 1978, § 41-4-3(G).

In the absence of a statute providing otherwise, the weight of judicial and other legal authority from New Mexico and other states permits state and local government entities to use their discretion to pay legal defense fees incurred by a public employee, under certain conditions. The applicable law was thoroughly analyzed in a 1985 Attorney General advisory letter addressed to the General Services Department, which was contemplating the provision of criminal defense insurance coverage for public employees. See N.M. Att'y Gen. Advisory Letter No. 85-23 (1985).¹

¹ The law pertaining to the authority of public bodies to provide a defense for its officials and employees in civil and criminal actions does not appear to have changed significantly since the 1985 advisory letter was issued. See Kimberly J. Winbush, J.D., Annotation, Payment of Attorney's Services in Defending Action Brought Against Officials

Then, as now, there was no pertinent New Mexico case law. Accordingly, the 1985 advisory letter reviewed court decisions from other states and gleaned from them the following five criteria that were applied in cases upholding the use of public money for defending public employees against allegations of wrongdoing in the absence of a controlling statute:²

- (1) the charges must arise from the discharge of an official duty in which the government has an interest;
- (2) the public employee must have been acting in good faith when the alleged wrongful conduct occurred;
- (3) the employing government entity must have express or implied legal authority to pay the employee's legal expenses;
- (4) the employee must be exonerated of the charges; and
- (5) the decision to pay the fees must be made by an impartial official or official body.³

The 1985 advisory letter dealt with criminal charges, but this office has applied similar criteria when public employees have sought reimbursement for legal expenses incurred in civil proceedings. A 1965 Attorney General opinion addressing legal expenses incurred by school board members concluded that a school board member charged in a civil suit with doing a wrongful act in the member's official capacity could be defended by spending public funds, provided the member prevailed in the lawsuit. N.M. Att'y Gen.

Individually as Within Power or Obligation of Public Body, 47 A.L.R.5th 553 (1997 & Cum. Supp. 2007) (hereafter "Winbush").

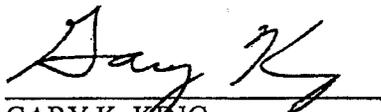
² The 1985 advisory letter also discusses cases from other states holding that a public body has a duty, even in the absence of a law or ordinance, to pay for a public employee's defense where the challenged conduct arose from the performance of the employee's official duties and, at the opposite extreme, that a public body had no authority to reimburse public employees for expenses they incur to defend themselves against criminal charges, even if they prevail. However, as stated above, applicable case law generally allows a public body, if it so elects, to pay for its employees' legal expenses in suits brought against them for acts committed in the discharge of their official duties. See, e.g., Hart v. County of Sagadahoc, 609 A.2d 282, 283-84 (Me. 1992). See generally Winbush, supra note 1.

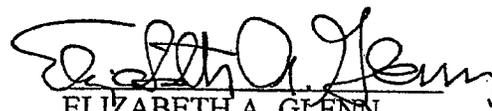
³ The requirement that an impartial official or public body make the decision to pay, like the other four criteria identified in the 1985 advisory letter, applies in the absence of a governing statute expressly allowing public bodies to pay their employees' legal defense fees in specified circumstances.

Op. No. 65-233 (1965). See also N.M. Att'y Gen. Op. Nos. 59-209 (1959) (town could reimburse town manager for successful defense of civil suit for libel arising from manager's discharge of a former employee, where the manager acted in good faith and within the scope of his official duties); 57-128 (1957) (concluding that public funds could be used to reimburse a district judge for expenses incurred in successfully defending himself from civil liability if the suit arose from acts committed while performing his official duties).

The requirements that the allegations arise from conduct within the public employee's official capacity or scope of employment and that the employee be exonerated ensure that public funds are not improperly used to provide a defense in personal proceedings. For example, this office has concluded that a school board could not hire an attorney to defend one of its members in a quo warranto proceeding (an action to determine or test an officer's right to hold and exercise his office) because such a proceeding is purely personal. N.M. Att'y Gen. Op. No. 65-233 (1965). See also N.M. Att'y Gen. Op. 88-18 (1988) (conservancy district could not reimburse expenses incurred by two of its directors in a successful election contest). The use of public money to pay an employee's personal legal expenses is specifically prohibited by the antidonation clause of Article IX, Section 14 of the New Mexico Constitution. See N.M. Att'y Gen. Op. No. 88-61 (1988) (Legislative Finance Committee's attempt to pay attorneys fees for two legislators who filed a lawsuit challenging governor's line item vetoes violated the antidonation clause because the legislators were acting in their individual capacities and the LFC was not a party to the lawsuit). See also N.Y. Att'y Gen. Informal Op. No. 2003-16, 2003 WL 22669327 (municipality's "payment of legal fees when an employee is found guilty would constitute an unconstitutional gift of public funds because an employee acting criminally is not acting within the scope of his public employment").

If the five criteria discussed above are met, we believe that public money may legitimately be used to provide a defense for school districts, officials and employees in legal proceedings alleging misconduct. Nevertheless, the legislature has the ultimate authority to determine the appropriate use of school district funds, including a prohibition against using public money to provide a defense for school officials and employees in lawsuits not covered by the Tort Claims Act or allowing payment of legal expenses only in connection with civil or other specified cases.


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